STATE OF MICHIGAN
SUPREME COURT

ANGLERS OF THE AUSABLE, INC., a Michigan nonprofit corporation; MAYER FAMILY INVESTMENTS, LLC, A Michigan limited liability company and NANCY A. FORCIER TRUST,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a department in the Michigan Executive Branch, and STEVEN E. CHESTER, Director of the Michigan Department of Environmental Quality; and MERIT ENERGY COMPANY, a Delaware Corporation,

Defendants-Appellees.

S Ct Docket No 138863, 138864, 138866

COA docket No 279301, 279306, 280265, 280266 (Consolidated)

LC Case No. 06-11697-CE(M)
Hon. Dennis F. Murphy

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AMICUS CURIAE BRIEF OF MICHIGAN CITIZENS FOR WATER CONSERVATION, INC. ("MCWC") IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF JURISDICTION

Amicus Curiae, Michigan Citizens for Water Conservation, Inc. ("MCWC"), rely upon the Statement of Jurisdiction as set forth in Plaintiffs'/Appellants' Brief on Appeal.

STATEMENT OF QUESTIONS PRESENTED

I. Under Michigan water law, did the Court of Appeals in *MCWC v. Nestlé* and in the instant *Anglers of the AuSable v. Dep't of Envtl. Quality* appeal commit reversible error when it misconstrued the common law doctrines governing water use adopted by this Court in *Dumont v. Kellogg* and *Schenk v. City of Ann Arbor* and instituted a "reasonable use balancing test" as the standard for resolution of water law disputes?[1]

The Trial Court would answer: "No."

The Court of Appeals would answer: "No."

Plaintiffs Anglers, Mayer and Forcier Trust answer: "Yes."

Defendant Merit answers: "No."

Defendant DEQ would answer: "No."

Amicus Curiae MCWC answers: "Yes."

II. Under both Michigan riparian and groundwater law, did the Court of Appeals in *MCWC v. Nestlé* and the instant *Anglers of the AuSable v. Dep't of Envtl. Quality* appeal commit reversible error when it included "private or public economic and social benefits" as an additional factor for determining whether a use is lawful under its "reasonable use balancing test"?[2]

The Trial Court would answer: "No."

The Court of Appeals would answer: "No."

Plaintiffs Anglers, Mayer and Forcier Trust answer: "Yes."

Defendant Merit answers: "No."

Defendant DEQ would answer: "No."

Amicus Curiae MCWC answers: "Yes."

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[1] This question combines and addresses Arguments I, A, B, and C, pp. 9-20, and II of Appellant's Brief pp. 25-28.

[2] This question addresses Argument I, D, of Appellant's Brief, pp.21-23.

STATEMENT OF PROCEEDINGS AND FACTS

On July 19, 2010, the Plaintiffs/Appellants, filed a Brief on Appeal. Amicus Curiae adopt the Statement of Material Proceedings and Facts presented in the Plaintiffs'/Appellants' Brief on Appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE

Michigan Citizens for Water Conservation, Inc. ("MCWC") is a non-profit corporation dedicated to the protection and conservation of Michigan's water resources. MCWC was formed after Nestlé of North America Inc.'s predecessor (Perrier Group of America) announced its plans to extract, divert, and sell water from the Dead Stream watershed. MCWC has over 2,000 members, many of whom are riparian[3] property owners in the Tri-Lakes area.

The decision made by this Court will not affect the plaintiff or defendants in *MCWC v. Nestlé*, as they entered a final stipulated order on July 6, 2009, imposing final injunctive limits on pumping and removal of water from the Mecosta County wells and the Dead Stream. However, MCWC remains concerned with the outcome of this appeal. Not only will it have a significant impact on the waters of the AuSable River system, but it also will have an impact on the Dead Stream and lakes affected by the pumping and future water diversion or exports in the Little Muskegon River Watershed and in all the waters and natural resources, including the Great Lakes of Michigan.

Should this Court affirm and retain the Court of Appeals misconceived "reasonable use balancing test" this decision will, without exception, negatively impact local riparian proprietors and groundwater users through the excessive financial costs now required to prove the science of hydrogeology and the economic and social benefit analysis mandated by such test.

MCWC has an interest in the correction to and reaffirmation of Michigan riparian and groundwater law as established by *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102 (1874) and *Schenk v. City of Ann Arbor*, 196 Mich. 75, 163 N.W. 109 (1917) and believe that this amicus curiae brief will aid the Court in weighing the underlying legal issues.

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[3] While technically, property owners on lakes are "littoral" owners, the term "riparian" is used in this brief to refer to both.

INTRODUCTION

MCWC respectfully submits this amicus brief on behalf of their 2,000 members, many of whom are riparian property owners in the Tri-Lakes area of Mecosta County, Michigan as well as on behalf of the citizens of Michigan in general to protect our most valuable natural resource, water and our communities' water supplies, and further, to retain the existing standards of review found in Michigan Supreme Court precedent. The intent of this amicus brief is to assist this Court in revisiting Michigan water law in its analysis of *Mich. Citizens for Water Conservation v. Nestlé Waters North America*, 269 Mich. App. 25, 709 N.W. 2d 174 (2005), ("*MCWC*") and the instant appeal so as to understand not only the errors in law made in the Court of Appeals but to appreciate the burden placed on citizen litigants in attempting to meet the Appeals Courts' "reasonable use balancing test" especially as related to its economic and social impact factors.

Michigan water law is controlled by two Michigan Supreme Court decisions. The Riparian branch is controlled by *Dumont* and the groundwater branch is controlled by *Schenk* The Court of Appeals committed reversible error in *MCWC* when it misconstrued *Dumont* and *Schenk* and *Schenk*'s subsequent line of cases and created the "reasonable use balancing test" for disputes between riparian and off-tract groundwater users. Moreover, the instant appeal, *Anglers of AuSable v. Dep't of Envtl. Quality*, 283 Mich. App. 115, 770 N.W.2d 359 (2009), compounded that error by improperly extending the "reasonable use balancing test" to essentially all Michigan water law disputes.

The historic distinction between, and the necessity for, the development of separate bodies of law for riparianism and groundwater has its origins from the inability to see or predict

the movement of water beneath the earth's surface.[4] Each body of law established its own legal principles for the reasonable use of a lake or stream or as to groundwater extraction. In the historic groundwater case, *Acton v. Blundell,* 152 Eng. Rep. 1228 (Ex. Chamb. 1843), the English court observed this difficulty:

> But in the case of a well, sunk by a proprietor in his own land, the water which feeds it from a neighboring soil, does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these under-ground sources have undergone in the progress of time: it may well be, that it is only of yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all.[5]

While there can be no argument that the science of hydrogeology has made great strides in understanding aquifers, the flow of subsurface water, and the connection between surface and groundwater, it is equally true that the financial cost of developing that science in litigation over water disputes is fully prohibitive to the common farmer, proprietor, or rightful user. No better example of the lack of equal access to the science of hydrogeology is MCWC and its ten years plus of litigation against one of the world's richest corporations, Nestlé Waters North America, Inc.[6] Given this reality, it remains wise to fully recognize and maintain the distinction between the two branches of water law and their respective legal principles.

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[4] JOSEPH SAX, BARTON H. THOMPSON JR., JOHN LESHY, ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 393 (West Group 4d ed. 2006).

[5] *Id.*

[6] Attached as Exhibits A & B are affidavits referencing the cost of MCWC's hydrogeology and biology experts to test and counter the hydrogeology science required AFTER remand by this Court. That cost of science figure is $97,340.50 without a trial, without attorney fees or other related deposition and transcript costs. Nor does it include any cost related to the economic and

While riparian and groundwater law each established its own independent legal principles for use of a lake or stream or groundwater, respectively, this Court and others, recognized the importance of ensuring the two bodies of law were consistent in terms of respecting the reasonable use of water for those who owned the land through or under which the water flows. Furthermore, in Michigan, should there be a dispute between riparian and off-tract groundwater users, groundwater law is the recognized applicable branch of law as established under *Schenk*. *Schenk*, recognized that off-tract groundwater use could not materially diminish a surface water. This Court understood that it does not make legal or equitable sense to allow groundwater users to materially diminish the common stream or lake shared by riparians by causing substantial injury, especially where the groundwater user had no riparian rights in common with the affected riparians.

In creating a "reasonable use balancing test," the Court of Appeals in *MCWC* ignored the balance struck between riparian and groundwater law in *Schenk* and it compounded the clear error further, in *Anglers of the AuSable*, by extending its "reasonable use balancing test" to a dispute between riparians users. *MCWC* and the instant appeal demonstrate a serious shift in Michigan water law, created by the Court of Appeals, which neglects the fundamental principles established in *Schenk* pertaining to off-tract use of groundwater and the fundamental principles in *Dumont* addressing 1) disputes between competing riparian users, 2) diversion of water not benefiting riparian land, and 3) interference by a non-riparian. This Court has never articulated a "reasonable use balancing test" and in addition, the Court of Appeals erred in *MCWC* by

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social cost factor of the *MCWC* "reasonable use balancing test." Additionally, Exhibit C is an excerpt from the deposition of Nestles' economist Patrick Anderson reflecting an incomplete billing of $29,000.00 at $460.00 per hour in his attempt to show a negative economic impact of a loss of pumping rates at Nestles' Sanctuary Springs wells. Whether his work was relevant under MRE 401 or admissible under MRE 402 remained to be decided by the trial court.

including into its "reasonable use balancing test" a private or public economic and social benefits factor that is not recognized by any legal precedent in Michigan. Inclusion of this factor by the Court of Appeals not only compounds its reversible error but results in a mistaken attempt at social engineering.

ARGUMENT

I. The Court of Appeals in *MCWC* and in the instant *Anglers of the AuSable* appeal committed reversible error when it misconstrued the common law doctrines governing water use adopted by this Court in *Dumont* and *Schenk* and instituted a "reasonable use balancing test" as the standard for resolution of water law disputes.

A. Standard of Review.

The Supreme Court reviews questions of common law *de novo*. *People v. Petty*, 469 Mich. 108, 113, 665 N.W.2d 443 (2003).

B. Michigan's water law is governed by this Court's decisions in *Dumont* and *Schenk*.

B. 1. *Dumont* is Michigan's controlling opinion regarding riparian law.

The Michigan Supreme Court, in *Dumont*, examined the water use of *two competing riparian proprietors on the same stream* and established the controlling legal principles pertaining to riparian rights in surface water for the state of Michigan. As between competing riparian proprietors, this Court adopted the doctrine of reasonable use. This doctrine is *only* applicable when there are competing riparian rights. The doctrine of reasonable use is *not* applicable to situations in which water is diverted outside the common watershed or in situations where there are competing water uses between a riparian and a non-riparian. Diversion of water that does not benefit the riparian land is considered unreasonable per se and interference by a non-riparian is held to a physical non-diminishment or impairment standard.

In *Dumont*, plaintiff, a downstream mill proprietor brought suit against defendant, an upstream mill proprietor, asserting that defendant who had constructed a dam, had interfered with plaintiff's riparian rights having diminished the flow of the stream below. *Dumont*, 29 Mich. at 420-21. This Court overruled the trial court's jury instruction, which was based on the natural flow doctrine. *Id.* at 423. This Court understood that if applied:

> [s]uch a rule would be in effect this: that the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream. *Id.* at 423.

Instead, this Court adopted the doctrine of reasonable use for competing riparian proprietors holding:

> It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress. *Id.* at 425.

Accordingly, in Michigan, between riparian proprietors, each may make reasonable use of the shared surface water, however this use is limited should the use unreasonably interfere with another riparian's reasonable use.

In addition to this Court's adoption of the reasonable use doctrine for competing riparian proprietors, it addressed two scenarios in which the reasonable use doctrine is *inapplicable*: diversion of surface water and interference by a stranger. *Id.* at 422. First, diversion of surface water, the Court stated:

> [I]t may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from the proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. *Id.*

Simply, diversion of surface water by any person, riparian or non-riparian, that does not benefit riparian land, is per se unreasonable.

Second, in the scenario in which there is interference by a stranger, the doctrine of reasonable use is inapplicable:

> It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters; for this also is wholly wrongful, and no question of the reasonableness of his action in causing the diminution can possibly arise. *Id.*

Here, a non-riparian may not interfere with a riparian's use of surface water and the non-riparian will be held to a strict non-diminishment or impairment standard.

In summary, this Court in *Dumont* established riparian law in Michigan. First, as between competing riparian proprietors, the doctrine of reasonable use in applicable. Second, if surface water is diverted and this diversion does not benefit riparian land, the diversion is per se unreasonable. Third, if there is interference by a non-riparian, this "stranger" will be held to a strict non-diminishment or impairment standard.

B. 1. (a) Application by the Court of Riparian Law post *Dumont.*

This Court has reaffirmed the holding in *Dumont* on several occasions. First, in *Hall v. City of Ionia*, 38 Mich. 493 (1878), as the upper riparian, the city of Ionia desired to divert water from a stream. A lower riparian, Hall, brought suit to prevent this diversion. *Id.* at 493-97. Citing *Dumont*, this Court held that "the complainant has a right to an injunction against the threatened proceedings of defendants to collect and divert the water to purposes foreign to their use and enjoyment of the woolen factory premises, and that the prayer of the bill to that effect should have been granted." *Id.* at 500. *Hall* directly applied the first exception regarding diversions cited in *Dumont*. "No person has a right to cause such a diversion, and it is wholly a

wrongful act, for which an action will lie without proof of special damage." *Dumont*, 29 Mich. at 422.

Second, in *Stock v. City of Hillsdale*, 155 Mich. 375, 119 N.W. 435 (1909), Stock and the city of Hillsdale were both riparian proprietors of a lake. For more than twenty years, the city of Hillsdale pumped and diverted an ever-increasing amount of water. *Id.* at 377. When the city proposed to double the capacity of the pumping station and after progressing considerably in construction, Stock sought an injunction against the city. *Id.* at 379. This Court stated that the circuit court's properly held that:

> the city had no right to divert the water as an upper riparian owner and to pump the water out of this lake for the use of citizens generally and to supply manufacturing establishments within its limits . . . He was also of the opinion that, had the complainant filed his bill promptly when it was first proposed to take water out of Bawbeese Lake, he would have been entitled to the injunction; but he held that, under the circumstances of this case, the complainant was not entitled to this special writ, but should be left to his remedy at law. *Id.* at 379-80.

While plaintiff was unable to enjoin defendant due to defendant's prescriptive right, this Court again acknowledged the first exception set out in *Dumont* regarding diversion of surface water as being unreasonable per se.

Similarly, in *Kennedy v. Niles Water Supply Co.,* 173 Mich. 474, 139 N.W. 241 (1913), plaintiffs, riparian proprietors on a lake, sought an injunction against defendant, Niles Water Supply which was diverting lake water to the city of Niles. *Id.* at 477-78. Again, this Court affirmed the lower court, which found this diversion improper; However, because defendant had obtained prescriptive rights, an injunction could not be enforced as to the original pipe line. *Id.* at 475-77.

Finally, in *Hoover v. Crane*, 362 Mich. 36, 106 N.W.2d 563 (1960), plaintiff a riparian cottage and resort owner brought suit against defendant, also a riparian user of the lake for irrigation of his fruit orchard. *Id.* at 37. This Court again, re-affirmed *Dumont*, stating "Michigan has adopted the reasonable-use rule in determining the conflicting rights of riparian owners to the use of lake water." *Id.* at 40. This Court further stated "[b]oth resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed." *Id.* at 42. Consequently, this Court affirmed that "defendant had a right to reasonable use of lake water." *Id.* at 37. Here, we see direct application of *Dumont's* holding that competing riparian proprietors are held to a reasonable use standard.

As demonstrated, *Hall*, *Stock*, *Kennedy,* and *Hoover* each re-affirm the principles laid out in *Dumont*. The first three cases address the first exception in *Dumont* regarding diversion of surface water as being unreasonable per se. The last case, *Hoover*, illustrates application of the doctrine of reasonable use between two competing riparian proprietors, which was again adopted in *Dumont*.

B. 2. *Schenk* is Michigan's controlling opinion regarding groundwater law.

The Michigan Supreme Court, in *Schenk*, examined a dispute between an on-tract user and an off-tract user of groundwater and established the legal principles for the state of Michigan pertaining to off-tract groundwater disputes. The groundwater principles established in *Schenk* stem from the doctrine of reasonable user, which is best understood as a correlative rights rule. The seminal case concerning the correlative rights rule, which *Schenk* also quotes, is *Katz v. Walkinshaw*, 141 Cal. 11, 70 P. 663 (1903). *Katz* states:

> Each owner of soil lying in a belt which becomes saturated with percolating water is entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use may interfere with water percolation in his neighbors' soil; but he has no right to injure his

> neighbors by an unreasonable diversion of the water percolating in the belt for the purpose of sale or carriage to distant lands. *Schenk*, 196 Mich. at 91 (quoting *Katz v. Walkinshaw*, 141 Cal. 11, 70 P. 663 (1903)).

In short, the correlative rights rule allows a landowner to make use of as much groundwater on-tract as does not unreasonably interfere with another landowner's on-tract use. An off-tract use, although not absolutely prohibited, is prohibited from causing any injury to an on-tract user.

In *Schenk*, the city of Ann Arbor purchased land three miles from the city for the purpose of pumping and diverting groundwater for use by city inhabitants, making it an off-tract user. *Schenk*, 196 Mich. at 76-77. The city of Ann Arbor:

> [P]roposes to use none, or at most only an inconsiderable, part of the water upon, or for the benefit of, the land from which it takes it, or for its own benefit as landowner; on the contrary, its purpose is to pipe the water away from the land, to sell some of it, to use some of it for municipal purposes, not to return any of it to the land. *Id.* at 81.

Plaintiff, an on-tract user of groundwater, contended that during the city's test pumping, his supply of groundwater in his well was interfered with and he sought an injunction in order to restrain the city from taking any more water from its wells. *Id.* at 79-80. Because the plaintiff was able to obtain a supply of water after having dug his well deeper, the trial court "concluded that an injunction ought not to be continued, and that plaintiff should be satisfied with a decree for such damages as had resulted from his apparent ascertainable injury." *Id.* at 80. On appeal, this Court asked "whether the court will enjoin the city from further contemplated use of the water, can be answered only by considering what are the rights of the parties." *Id.* In addressing this question, this Court pronounced Michigan's groundwater-legal principles.

This Court adopted the doctrine of reasonable user pertaining to off-tract uses and as stated previously, is comparable to the correlative rights rule. Moreover, this Court, relied

heavily upon an opinion from New Jersey, *Meeker v. City of East Orange*, 77 N.J.L. 623, 74 A. 379 (1909) in establishing the doctrine of reasonable user as the groundwater law for Michigan, for off-tract uses. *Meeker* was drawn to the doctrine of reasonable user because it could not reconcile the historic English rule referred to as the absolute ownership rule:

> Here, the impracticability of applying the rule of absolute ownership to the fluid, water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked . . . Where percolating water exists in a state of nature generally throughout a tract of land, whose parcels are held in several ownership by different proprietors, it is, in the nature of things, impossible to accord to each of these proprietors the absolute right to withdraw ad libitum all percolating water which may be reached by a well or pump upon any one of the several lots, for such withdrawal by one owner necessarily interferes to some extent with the enjoyment of the like privilege and opportunity by the other owners. *Schenk*, 196 Mich. at 83 (quoting *Meeker v. City of East Orange*, 77 N.J.L. 623, 74 A. 379 (1909)).

The *Meeker* Court then adopted the doctrine of reasonable user, which it saw as more just and equitable:

> This does not prevent the proper user by any land-owner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results there from that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his well, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses. *Id.* at 84 (quoting *Meeker v. City of East Orange*, 77 N.J.L. 623, 74 A. 379 (1909)).

The doctrine of reasonable user divides groundwater use into two categories: on-tract and off-tract. *Schenk*, in adopting and applying this principle as to off-tract use, held:

> [T]he right of defendant to make use of the water is a qualified right. It is qualified by this rule of reasonable user . . . The city is a private owner of this land, and furnishing of water to its inhabitants is its private business. It is imperative that the people of the city have water; it is not imperative that they secure it at the expense of those owning lands adjoining lands owned by the city. It does not follow that the city may not reasonably make use, for the purpose intended, of a large volume of water from this land. I have stated the rule by which the rights of the city and other landowners must be determined. *Id.* at 91-92.

The doctrine of reasonable user requires that off-tract uses which do not benefit the property from which it is withdrawn, cannot interfere with another's on-tract use of that groundwater or materially diminish the flow of an on-tract users well, spring, or stream. Moreover, it is important to point out that the language in the aforementioned rule also provides a hybrid rule between groundwater and riparian disputes, because of the direct connection of groundwater to the integrity of streams and lakes. If groundwater is withdrawn for off-tract use, it may not materially diminish the flow of an on-tract user's surface water. In this way, riparian and groundwater rules are harmonized, so the use of groundwater does not undermine riparian water bodies and those who share uses equally and in common because they are proprietors of land on a stream or lake.

B. 2. (a) Application by Michigan courts of groundwater law post *Schenk*.

The holding in *Schenk* pertaining to off-tract use was reaffirmed by this Court in *Bernard v. City of St. Louis*, 220 Mich. 159, 189 N.W. 891 (1922). In addition, two Court of Appeals cases discussing on-tract use provide guidance as to how the doctrine of reasonable user should be applied in disputes pertaining to on-tract use. First, in *Bernard*, plaintiffs were landowners who ran a hotel/sanitarium and used groundwater from a spring for its guests/patients as the water was alleged to contain healing properties. Their use of the groundwater was on-tract.

Defendant, the city of St. Louis, sunk wells on the adjacent property to extract groundwater to be used off-tract by city residents. *Id.* at 161. Plaintiffs sought an injunction "restraining the city from operating its wells to the detriment of their own supply . . . ." *Id.* The lower court granted plaintiffs injunctive relief, requiring "defendant, the city of St. Louis . . . absolutely desist and refrain from pumping from its wells, and any other wells, to such an extent as to diminish the flow or the pressure of the water flowing from the plaintiffs' well . . . ." *Id.* at 161-62.

In *Bernard*, like *Schenk*, a city was removing groundwater for off-tract use. In *Schenk*, this Court asserted that off-tract use is not prohibited but rather limited. The off-tract user can withdraw groundwater to the extent that it does not interfere with another's on-tract use or does not materially diminish or impair another's well, spring or stream. *Schenk*, 196 Mich. at 84. In *Bernard*, this Court affirmed *Schenk* and allowed the city to withdraw water but the city could not interfere with the plaintiffs' reasonable use. This Court "modified [the decree] requir[ing] defendant not to interfere with an adequate supply of water for the plaintiffs' reasonable use, the water to be conserved by the plaintiffs, and they to be compensated for any damage they may sustain by reason of having to install pumping machinery or other appliances." *Bernard*, 220 Mich. at 165.

Hart v. D'Agostini, 7 Mich. App. 319, 151 N.W.2d 826 (1967) concerned groundwater usage between two on-tract users. Plaintiffs' well went dry when the defendants, while constructing a sanitary sewer trunk line, temporarily drained the subsurface water in order to install the sewer. *Id.* at 321. The trial court "ruled that when a person has established a lawful water supply within the confines of his own land, that water supply cannot be interfered with without consequences." *Id.* In reversing the trial court the Court of Appeals cited the distinction regarding on-tract use and off-tract use established in *Schenk* and applied in *Bernard*:

> Both cases involved a public water company intentionally removing water from the subterranean supply and transporting it elsewhere for consumption, and in both cases it was held that such removal of the water, which was in fact a partial destruction of the water table, was an unreasonable use of the specific land and unreasonable as to the surrounding lands. The municipalities were liable for the partial destruction of the water table with the resulting damages to the wells on surrounding land. *Id.* at 322.

Hart is distinguishable from *Bernard* and *Schenk* as it pertained to an on-tract groundwater dispute. While *Schenk* established the doctrine of reasonable user for off-tract use, it did not extend the doctrine of reasonable user for on-tract use of groundwater. While this Court has not specifically ruled on on-tract use of groundwater, the Court of Appeals in *Hart* proceeded to apply to on-tract disputes, the portion of the doctrine of reasonable user which pertained to on-tract use as established by *Meeker* and quoted by *Schenk*:

> This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, *nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring properties may thus be interfered with or diverted.*" *Id.* at 322 (quoting *Schenk*, 196 Mich. at 75).

By applying the facts in *Hart* to the portion of the doctrine of reasonable user pertaining to on-tract use, the *Hart* court concluded:

> In the case before us water was not transported to distant areas for consumption, nor was there any evidence of permanent damage to the subterranean water table. Here, water was merely moved out of the immediate area of the public easement in order to facilitate sewer construction. Improvement and reasonable development of the public utility easement required such steps. As to the surrounding areas, it was not unreasonable to have a trunk line sewer buried on a public easement, as such use was intended for the area when it was platted. Further, the sanitary sewer trunk line benefitted the area as it was so constructed to allow the surrounding homes to attach their sewers to the trunk line. *Hart*, 7 Mich. App. at 322.

In sum, the *Hart* court, by distinguishing itself from *Bernard* and *Schenk*, recognized the distinction between on-tract and off-tract use of groundwater, and applied the doctrine of reasonable user pertaining to on-tract use and held that the defendant's sewer construction was "reasonable development."

The second Court of Appeals case to consider the applicable rule pertaining to on-tract groundwater use was *Maerz v. United States Steel Corporation*, 116 Mich. App. 710, 323 N.W.2d 524 (1982). The Court of Appeals, again, applied the portion of the doctrine of reasonable user which pertained to on-tract use, however the *Maerz* court further clarified the principles relating to on-tract groundwater use, finding it also to be a correlative rights rule.

Defendant operated a limestone quarry, which used groundwater in its operation. Plaintiffs brought suit for damages, based on tort law, claiming the loss of their well, which was their source of potable water, was caused by defendant's activities. The trial court granted defendant partial summary judgment "holding that 'disposal of percolating waters for the beneficial ownership or enjoyment of the land from whence they are taken [on-tract] is not actionable.'" *Id.* at 712. The Court of Appeals, reversed the partial summary judgment and stated "[i]n summary our analysis of these cases [*Meeker* and progeny as well as *Bernard* and *Hart*] leads us to conclude that they do not establish as the law of Michigan that extraction of underground water for a purpose connected with the land from which it is withdrawn is, per se, not actionable." *Id.* at 720.

In *Maerz*, the Court of Appeals, quoted the doctrine of reasonable user as established by *Meeker*:

> This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although

> the underground water of neighboring property may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is renders so arid as to be less valuable for agriculture, pasturage, or other legitimate uses. *Id.* at 716-717.

Maerz acknowledged that the *Schenk* court adopted the doctrine of reasonable user for off-tract use and went on to state:

> The Schenk Court concluded that, although the English rule is the one applied and to be applied in respect to most of the ordinary uses of land, it was not applicable to the case before it. To the case before it the *Schenk* Court applied the principle that the plaintiff neighboring landowner had a correlative right to the underground water that had been violated, for which violation he was entitled to damages. *Id.* at 717.

Having correctly understood the doctrine of reasonable user for off-tract use as comparable to the correlative rights rule, the Court of Appeals then sought to extend the doctrine of reasonable user to on-tract uses and further clarify this doctrine considering it too to be a correlative rights rule.

First, it acknowledged that the facts in *Schenk* concerned off-tract use and the correlative rights rule, while adopted by this Court in *Schenk*, was in that instance only applied to off-tract use and "[p]ronouncements as to the law to be applied [in on-tract situations] . . . were, therefore, dictum, lacking the force of an adjudication." *Id.* Second, while acknowledging that *Schenk* drew the doctrine of reasonable user from *Meeker*, the *Maerz* court believed the specific language from *Meeker* quoted in *Schenk*, "gives the impression the *Meeker* Court intended to limit its repudiation of the English rule to situations involving withdrawal of subterranean waters for off-premise use." *Id.* at 718. *Maerz* considered that impression incorrect and believed the

Meeker Court repudiated the English rule[7] for both off-tract and *on-tract* uses of groundwater. *Maerz* recognized *Meeker* was clarified five years later by the New Jersey court in *P. Ballantine & Sons v. Pub. Serv. Corp of N.J.*, 86 N.J.L 331, 91 A. 95 (1914) to have applied the correlative rights rule to on-tract uses:

> 'Since the decision of this court (in 1909) in *Meeker* it is the settled law of this state that the landowner has not an absolute and unqualified property in all water found percolating in his soil to do what he pleases with it. He has the right to its use *only in a reasonable manner and to a reasonable extent, for his own benefit for domestic purposes as well as in manufacturing, and his own consumption as in agriculture, irrigation and the like, and without undue interference with the rights of other landowners to the like use and enjoyment of such water.*' *Maerz*, 116 Mich. App. at 718 (quoting *P. Ballantine & Sons*, 86 N.J.L. at 333-334).

In addition, the *Maerz* court reviewed a more recent New Jersey case, which "concluded that *Meeker* never intended its correlative rights rule be limited to situations of off-premises use of withdrawn subterranean water." *Maerz*, 116 Mich. App. at 718 (citing *Woodson v. Twp. of Pemberton*, 172 N.J. Super. 489, 503-504, 412 A.2d 1064 (1980)). The court in *Woodson*:

> Pointed to *Meeker's* strong approval of a New Hampshire decision which held that: '[T]he true rule is that the rights of each owner being similar, and their enjoyment dependent upon the action of other landowners, their rights must be correlative and subject to the operation of the maxim *sic utera, & c.*, so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property in view of the similar rights of others.' *Id.* (quoting *Woodson*, 172 N.J. Super. at 503-504).

Therefore, the Court of Appeals in *Maerz* ultimately stated that "the view that *Schenk* established a rule permitting unrestricted withdrawal of underground water for on-premises purposes not only relies upon dictum but assumes *Schenk* adopted from *Meeker* a rule that was not there." *Maerz*, 116 Mich. App. at 719. The Court of Appeals in *Maerz* thus recognized that not only did

[7] The English rule is also known as the absolute user rule and this rule was established by the Court of Exchequer in *Acton v. Blundell*, 12 Mees &W 324, 152 Eng. Rep. 1223 (Exch,1843).

the doctrine of reasonable user extend to on-tract use but was also comparable to the correlative rights rule.

While *Maerz* both properly extended the doctrine of reasonable user to on-tract uses and understood this to be akin to the correlative rights rule, the court unfortunately went on to create unnecessary confusion in its discussion of the Restatement (Second) of Torts section 858 by likening the correlative rights rule to the Restatement (Second) of Torts:

> Under this rule [correlative rights] a landowner is unrestricted in his right to extract underground waters from his property up to, but not beyond, the point the exercise of such right unreasonably interferes with the similar, or correlative right, of his neighbor. This is substantially the rule adopted by the American Law Institute, set forth in Restatement Torts, 2d § 858 . . . . *Maerz*, 116 Mich. App. at 714-15.

This is error. The correlative rights rule and the Restatement (Second) of Torts section 858 are and remain different doctrines.

> Section 858 holds a groundwater extractor liable for unreasonable harm to others that occurs by lowering the water table or withdrawing water in excess of a reasonable share of the annual supply or total store of groundwater. It identifies several factors (the same ones that apply to reasonable use riparianism in surface water) to be considered to evaluate the reasonableness of uses in competition with one another. The Restatement approach is not purely "ripariansim turned on its side," [correlative rights rule] because it does not draw a strong distinction between use on and off the overlying land.[8]

Maerz's central focus of its opinion was its clarification of the doctrine of reasonable user regarding on-tract groundwater use. The court clearly demonstrated that the correlative rights rule was the applicable rule to both off-tract as well as on-tract uses. In doing so, the court identified and drew a strong distinction between on-tract and off-tract use. Because it drew such

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[8] JOSEPH SAX, BARTON H. THOMPSON JR., JOHN LESHY, ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 416 (West Group 4d ed. 2006).

a strong distinction, it is apparent that *Maerz* misunderstood the difference between the doctrines and its comment likening the Restatement (Second) of Torts section 858 to the correlative rights rule must be recognized as clear error.

The *Maerz* court's error was further compounded when the Court of Appeals observed "that the principles expressed in Restatement Torts, 2d, p 258 are consistent with the Michigan adjudications on the subject . . . and should be followed in Michigan." *Maerz*, 116 Mich. App. at 720. This too is error. To clarify, the *Maerz* court considered the doctrine of reasonable user to be applicable to both off-tract and on-tract uses. Moreover, *Maerz* considered the doctrine of reasonable user to be comparable to the correlative rights rule. The doctrine of reasonable user was affirmed in *Bernard* and applied in *Hart*. Thus to *Maerz*, both *Bernard* and *Hart* applied the correlative rights rule. But because of *Maerz's* initial error finding the correlative rights rule as substantially similar to the Restatement (Second) of Torts section 858, the Michigan adjudications which applied the correlative right rule would also then appear to the *Maerz* court to be consistent with the principles expressed in Restatement (Second) of Torts section 858. This is error, not only because the two doctrines are distinct but because Michigan adjudications are not consistent with the Restatement (Second) of Torts section 858.

The confusion created by *Maerz* aside, this Court in *Schenk* and its progeny established, affirmed, and made whole the legal principles for groundwater in Michigan. *Schenk* established the doctrine of reasonable user, better understood as the correlative right rule, for off-tract uses. While the doctrine of reasonable user also pertains to on-tract groundwater use, the facts of the case and its holding only applied to off-tract groundwater disputes. *Bernard* then affirmed this Court's holding in *Schenk* pertaining to off-tract groundwater use. As *Schenk* only applied the doctrine of reasonable user to off-tract use, the Court of Appeals in *Hart* and *Maerz*, extended

the doctrine of reasonable user to on-tract groundwater use. The two Court of Appeals decisions turned to *Schenk* for guidance. While *Hart* applied *Meeker's* reasonable user doctrine pertaining to on-tract use, *Maerz* dissected *Meeker* and *Schenk* and their progeny and concluded that the doctrine of reasonable user for on-tract use should also be read as a correlative rights rule. This Court has neither spoke to nor overruled the *Hart and Marez* extension of the doctrine of reasonable user concerning on-tract groundwater uses. Furthermore, there is simply no legal precedent for the observation in *Maerz* that Michigan water law is consistent with or substantially similar to section 858 of the Restatement (Second) of Torts.

C. The Michigan Court of Appeals in *MCWC* misinterpreted Michigan's water law established by this Court.

C. 1. The "reasonable use balancing test" as articulated in *MCWC.*

The "reasonable use balancing test," as explained by the Court of Appeals in *MCWC*, is a test that is evaluated on a case by case basis but maintains three underlying principles:

> First, the law seeks to ensure a 'fair participation' in the use of water for the greatest number of users . . . Second, the law will only protect a use that is itself reasonable . . . Third, the law will not redress every harm, no matter how small, but will only redress unreasonable harms. *MCWC, 269 Mich. App.* at 69.

In order to determine whether a use is reasonable, the test evaluates and balances numerous factors such as: "(1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of water use, and (6) any other factor that may bear on the reasonableness of the use." *Id.* at 71.

The "reasonable use balancing test" established by the Court of Appeals in *MCWC*, however, disregarded this Court's precedent in water law. It wholly ignored the distinction between riparian law as established by *Dumont* and groundwater law as established by *Schenk.*

Moreover, it ignored the fact that *Schenk* established the rule for hybrid situations involving disputes between riparian and off-tract groundwater users. Withdrawal of groundwater for off-tract use is not allowed if "it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, *or streams* are thereby materially diminished in flow . . ." *Schenk*, 196 Mich. at 84. (emphasis added). In fact, the court in *MCWC* recognized that "the language quoted from *Meeker* [pertaining to the doctrine of reasonable user] suggest that the reasonable use rule would apply to groundwater users whose use interfered with riparian water rights." *MCWC*, 269 Mich. App. at n. 38. Yet, rather than apply the material diminishment test pertaining to disputes between riparian and off-tract groundwater users as established by *Schenk*, the court in *MCWC* chose to interpret *Dumont* and the progeny of *Schenk* to have developed a "reasonable use balancing test" to be applied in instances where there is a dispute between riparian and groundwater users.

> Beginning with *Dumont* and *Schenk* and concluding with *Maerz*, Michigan courts have consistently avoided strict rules that permit one water user to utilize water at the expense of an adjacent user. Instead, while employing various tests, the courts have generally sought to ensure the greatest possible access to water resources for all users while protecting certain traditional water users. See *Dumont*, *supra* at 423-425. Michigan courts have already recognized the value of the "reasonable use balancing test" for that purpose. See *Maerz*, *supra* at 717-720, 323 N.W.2d 524; *Hart*, *supra* at 322-323, 151 N.W.2d 826; *Dumont*, *supra* at 423-425. Consequently, in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water disputes, we adopt the "reasonable use balancing test" first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users. *Id.* at 67-68.

Construing a "reasonable use balancing test" from the aforementioned cases and then pronouncing the "reasonable use balancing test" as existing Michigan law is without this Court's authority.

C. 1. (a) The "conception" of the "reasonable use balancing test" in *Dumont.*

The Court of Appeals in *MCWC*, attributes *Dumont* as establishing the "reasonable use balancing test" to resolve disputes between competing riparian and groundwater users. Yet, in its discussion regarding *Dumont*, *MCWC* acknowledged that this Court adopted the doctrine of reasonable use for *competing riparian proprietors*. *Id.* at 55. The Court of Appeals understood the reasonable use doctrine to mean:

> 'a riparian owner may make any and all reasonable uses of the water, as long [as] they do not unreasonably interfere with the other riparian owners' opportunity for reasonable use.' 'Whether and to what extent a given use shall be allowed under the reasonable use doctrine depends upon the weighing of factors on the would-be user's side and balancing them against similar factors on the side of other riparian owners. *Id.*

The court in *MCWC* concluded, "under Michigan's riparian authorities, water disputes *between riparian proprietors are resolved by a reasonable use test* that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances." *Id.* at 58 (emphasis added).

While the reasonable use doctrine was characterized by the court in *MCWC* as a reasonable use test for competing riparians, they proceed to misapply it to resolve disputes between riparian and groundwater users, fully ignoring the *Schenk* principles. Until *MCWC*, the reasonable use doctrine or test did not extend to situations in which there is a hybrid dispute between riparian and groundwater users, instead *Schenk* applied. *MCWC*, however, stated "we adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes

between riparians and groundwater users." *Id.* at 68. This is reversible error as the existing groundwater principles established in *Schenk* address this issue.

C. 1. (b) The evolution of the "reasonable use balancing test" within groundwater law.

While *MCWC* attributes the origin of the "reasonable use balancing test" to *Dumont* the court also uses *Schenk's* progeny to demonstrate an evolution within groundwater law towards the "reasonable use balancing test." It asserted that "Michigan courts continued to apply the reasonable use rule stated in *Schenk* but applied it in a flexible manner to ensure that no one user would be deprived of all beneficial use of its water resources." *Id.* at 62. This alleged flexibility within *Bernard*, *Hart*, and *Maerz* provided enough evidence for the *MCWC* court to conclude that a "reasonable use balancing test" also evolved within groundwater law.

The Court of Appeals in *MCWC* believed that *Schenk* established the reasonable use rule for off-tract use, explaining the reasonable use rule "permits withdrawals of water whose use is not connected with the land from which it is withdrawn, but only to the extent that they do not interfere with an adjacent water user's reasonable use." *Id.* at 61-62.

The first post-*Schenk* case that the Court of Appeals in *MCWC* addressed was *Bernard*, which involved off-tract use. The court in *MCWC* viewed the Supreme Court's decision as possessing characteristics of a balancing test:

> While the *Bernard* Court did not state that it was employing a balancing test, its approach to solving the water dispute before it bears the hallmarks of a balancing test. The Court explicitly rejected an out-right injunction against the defendant's off-tract water use simply because it diminished the flow and pressure of the plaintiffs' wells. Instead, the Court ensured that both parties would be able to utilize the water supply by compelling the defendant to limit its pumping activities to a level that did not interfere with an adequate supply of water for the plaintiffs' reasonable use. *Id.* at 63.

The court in *MCWC* contended that *Bernard* "actually struck a balance between the two uses that attempted to ensure that both parties would have reasonable access to the common water supply." *Id.* However, in reality, *Bernard* simply applied the reasonable user doctrine pertaining to off-tract use as adopted by *Schenk.* The rule states that groundwater withdrawal for use off-tract is prohibited "if it results there from that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow . . . ." *Schenk*, 196 Mich. at 84. This Court, in *Bernard*, stated: "[i]n the instant case we think the decree should be modified so as to require defendant not to interfere with an adequate supply of water for the plaintiffs' reasonable use . . . ." *Bernard*, 220 Mich. at 165. This is direct application of *Schenk,* there is no indication that *Schenk* is applied "in a flexible manner" and to believe otherwise, is error in interpretation.

Next, the court in *MCWC* interpreted two later Court of Appeals decisions, *Hart* and *Maerz*, addressing on-tract usage of groundwater, to have shifted "from the strict application of the reasonable use rule, which preserves the English rule for on-tract water disputes, to a balancing approach . . . ." *MCWC*, 269 Mich. App. at 65. As a result of this alleged shift, the Court of Appeals in *MCWC* repudiated the holding of *Schenk* and boldly adopted the "reasonable use balancing test" applicable to all groundwater disputes without distinction of on-tract or off-tract use. This is error

As this Court has not specifically addressed the doctrine of reasonable user pertaining to on-tract uses either in *Schenk* or other Supreme Court decisions, the Court of Appeals in *Hart* and *Maerz* did address and extend that portion of the doctrine of reasonable user pertaining to on-tract uses. While the Court of Appeals decisions in *Hart* and *Maerz* would thus arguably

demonstrate a shift for on-tract groundwater disputes, this shift is not as dramatic or remarkable as the court in *MCWC* suggest; and it certainly does not support the adoption of the "reasonable use balancing test" be the applicable rule to all groundwater disputes or the extension of the "reasonable use balancing test" to all water disputes, including riparian lakes and streams as held by the Court of Appeals in the instant appeal.

In *Hart*, the court distinguished *Schenk* and *Bernard* as off-tract cases recognizing that groundwater law provides a distinction between on-tract disputes and off-tract disputes, each having its own independent principles. *Hart*, 7 Mich. App. at 323. The court in *MCWC* stated that while the "*Hart* Court could have applied the strict English rule to the facts before it, which *Schenk* implied was still applicable to disputes involving two on-tract groundwater users, the Court instead examined the relevant factors and determined whether the defendants' use was reasonable in light of those factors and the harm caused." *MCWC*, 269 Mich. App. at 64-65.

While *Hart* did not apply the English rule, the assertion made by the court in *MCWC* that this was a "trend toward applying a balancing test" *Id.* at 64, is misleading. *Hart* did nothing more than apply the portion of the doctrine of reasonable user established in *Meeker* pertaining to on-tract use. As this Court had already adopted and applied the doctrine of reasonable user pertaining to off-tract disputes, *Hart* logically extended the doctrine of reasonable user to on-tract use. In fact, it directly applied the portion which states: *nor does it prevent any reasonable development of his land* by mining or the like . . . ." *Hart*, 7 Mich. App. at 322 (quoting *Schenk*, 196 Mich. at 84). *Hart* examined whether the sewer construction was reasonable development and determined that it was. For the court in *MCWC* to assume *Schenk* was applied in a flexible manner and proclaim that *Hart* represents a shift towards a "reasonable use balancing test" is error.

Similarly, the court in *MCWC* suggested that the Court of Appeals in *Maerz*, (again a case concerning competing on-tract usage of groundwater), "explicitly rejected the traditional reasonable use rule and the English rule as the law applicable to groundwater disputes in Michigan. Instead, it determined that Michigan precedents had departed from the strict application of those rules in favor of a balancing approach to the resolution of groundwater disputes." *MCWC*, 269 Mich. App. at 67. *MCWC*'s perception that *Maerz* not only shifted Michigan's on-tract groundwater law but all groundwater law to the "reasonable use balancing test" is again error. Both the court in *Maerz* and the court in *MCWC* create confusion regarding the relationship of the correlative rights rule and the Restatement (Second) of Torts section 858. This confusion results in the illusion that *Maerz* adopted a "reasonable use balancing test" for on-tract groundwater disputes.

The *Maerz* court understood the doctrine of reasonable user to be comparable to the correlative rights rule. *Maerz*, 116 Mich. App. at 714-19, *see supra* pp. 18-19. However, the *Maerz* court in defining the correlative right rule incorrectly stated that the correlative rights rule was "substantially the rule adopted by the American Law Institute, set forth in Restatement Torts, 2d, § 858 . . . ." *Id.* at 714-15. Misunderstanding that there was a relationship between correlative rights rule and the Restatement explains why the *Maerz* court concluded that "the principles expressed in Restatement Torts, 2d § 858, p 258 are consistent with the Michigan adjudications on the subject . . . and should be followed in Michigan." *Id.* at 720. *Maerz* believed that the correlative rights rule was substantially similar to the Restatement (Second) of Torts section 858 therefore, Michigan adjudications i.e. *Bernard* and *Hart*, which are consistent with application of the correlative rights rule would then appear to be consistent with the Restatement (Second) of Torts section 858.

MCWC further confused the issue by stating that the correlative rights rule, which the *Maerz* court considered substantially the Restatement (Second) of Torts section 858, was the Restatement's approach. "While the *Maerz* Court correctly summarized the Restatement's approach, the characterization of the Restatement's rule as a correlative rights rule is unfortunate." *MCWC*, 269 Mich. App. at n.39. By dismissing the *Maerz* court's initial statement, regarding correlative rights, the court in *MCWC* ascribed the rest of the *Maerz* opinion to the Restatement (Second) of Torts section 858. This created two problems. First, the court in *MCWC* used the discussion of *Meeker* and its progeny to provide evidence that "the *Meeker* Court's holding adopted a reasonable use rule similar to the Restatement's approach for both on-tract and off-tract groundwater use." *Id.* at n.41. This is error, *see supra* pp. 18-20, the *Maerz* court examined the *Meeker* progeny in order to assert that the correlative rights rule not only applies to situations of off-tract uses but also to on-tract uses. Second, by dismissing the correlative rights rule laid out by the *Maerz* court and asserting it as the Restatement (Second) of Torts section 858, the *Maerz* court's final holding that "the principles expressed in Restatement Torts, 2d, § 858, p258 are consistent with the Michigan adjudications on the subject and should be followed in Michigan . . ." *Maerz*, 116 Mich. App. at 720, is skewed. It is skewed because it creates an illusion that a shift occurred in groundwater law and the "reasonable use balancing test," possessing principles of the Restatement (Second) of Torts, was adopted by the *Maerz* court. To explain, *MCWC* believed that *Maerz* shifted groundwater law for on and off-tract uses to a balancing test with principles of the Restatement (Second) of Torts section 858. In actuality, *Maerz* established the doctrine of reasonable user for on-tract groundwater use and recognized the entire doctrine to be comparable to the correlative rights rule. The only arguable shift pertained to on-tract groundwater use. However this shift did not extend to a balancing test with

principles of the Restatement (Second) of Torts section 858 as *MCWC* suggests. *MCWC* only arrives at its conclusion because the court dismissed the correlative rights rule laid out at the outset and chose to read the decision through the lens of the Restatement (Second).

The Court of Appeals in *MCWC* asserted that the Michigan "authorities establish a "reasonable use balancing test" similar to the Restatement's rule." *MCWC*, 269 Mich. App. at 53. However, these authorities did not establish a "reasonable use balancing test." First, ascribing *Dumont* as establishing the "reasonable use balancing test" is incorrect. *Dumont* established the doctrine of reasonable use between competing riparian users, this doctrine does not extend to hybrid situations between riparian and groundwater users. In hybrid situations, *Schenk* and its legal principles must be followed. Second, believing that the "reasonable use balancing test" to have also evolved through Schenk's progeny is also incorrect. *Schenk* established groundwater principles pertaining to off-tract disputes and its holding was applied in *Bernard*. Moreover, *Hart* and *Maerz*, concern on-tract disputes and the Court of Appeals in both decisions merely tried to examine the applicable principles for on-tract disputes. Both decisions applied the doctrine of reasonable user relating to on-tract users, which as *Maerz* suggests is also comparable to the correlative rights rule.

The legal impact of the application of the "reasonable use balancing test" to disputes between riparian and groundwater users, destroys established legal principles identified in *Schenk*. As discussed, central to groundwater law is the distinction between on-tract and off-tract uses. This distinction determines the applicable principles to be applied. In a hybrid dispute between a riparian and off-tract groundwater user, the correct standard to be applied is an impairment standard. Groundwater cannot be withdrawn for off-tract use if it interferes with a neighboring or adjacent landowner's on-tract use of groundwater or materially diminishes a well,

spring, or stream of a neighboring or adjacent landowner. Schenk, 196 Mich. at 84. The "reasonable use balancing test" on the other hand, removes any distinction between on or off-tract use and instead, designates one factor amongst several, to give preference to the withdrawal of water used to benefit the land. The Court of Appeals in *MCWC* explained:

> When determining the purpose of the use, the court should consider . . . whether the use benefits the land from which all the water is extracted . . . water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted." *Id.* at 72

Dismissing the appropriate and applicable legal principle established in *Schenk* and instead creating a "reasonable use balancing test" is consequentially wrong and can prove erroneous in its application. In *MCWC*, application of the "reasonable use balancing test" focused primarily on its newly created economic and social benefits factor, *see infra* pp. 33-36, considering Nestlé's use of the water to be beneficial to the community by providing jobs and tax revenue. Little if any focus was given to the fact that Nestlé's off-tract water withdrawal did not benefit the land from which it was withdrawn. Had the court in *MCWC* applied *Schenk* to the hybrid situation that was presented, Nestlé because it was withdrawing water for off-tract use, would have been held to a material diminishment standard. As the court in *MCWC* chose to apply its "reasonable use balancing test," Nestlé was not held to the appropriate standard and for the first item in Michigan jurisprudence, the rights of riparians to equal and reasonable water common to them, as between proprietors of land through which water flows, were subjected to the rights of other persons to cause substantial injury far beyond even the material injury or impairment standard. Additionally, for the first time, an infinite number of persons and entities outside a

watershed could also allege an offset of substantial harm or injury with allegations of social and economic benefits.

C. 2. Application of the "reasonable use balancing test" in the instant appeal is error.

Dumont and *Schenk* control water law in Michigan. As discussed, *Dumont* is the controlling opinion for riparian law and *Schenk* is the controlling opinion for groundwater law (off-tract). The "reasonable use balancing test" adopted by Court of Appeals in *MCWC* is not controlling law and should not have been followed by the court in *Anglers of the AuSable*. In a dispute between an off-tract groundwater user and a riparian, the Court of Appeals in *MCWC* failed to follow the doctrine of reasonable user, better understood as the correlative rights rule as established by *Schenk*. In a dispute between competing riparians, the Court of Appeals in *Anglers of the AuSable* failed to follow the principles established in *Dumont*. The instant appeal, *Anglers of the Ausable* not only failed to apply the proper principles as required under *Dumont,* but in holding the "reasonable use balancing test" as applicable to riparian disputes, the court compounded the errors of the *MCWC* decision and in effect, extended the "reasonable use balancing test" to all water disputes in Michigan.

The court in *MCWC*, articulated that the "reasonable use balancing test" to be "the law applicable to disputes between riparian and groundwater users" *MCWC*, 269 Mich. App. at 68. While the court in *MCWC* observed that the "reasonable use balancing test" was first stated in *Dumont*, it does not follow that the "reasonable use balancing test" is applicable to riparian disputes. Rather, the court in *MCWC* inappropriately merged principles of riparian law with groundwater law in order to assert that Michigan authorities established a "reasonable use balancing test" applicable to disputes between riparian and groundwater users, again ignoring *Schenk*.

Because the instant case involves a dispute between riparians, the applicable law is *Dumont*. The established legal principles involved are first, as between competing riparian proprietors, the doctrine of reasonable use is applicable. Second, if surface water is diverted and this diversion does not benefit riparian land, the diversion is per se unreasonable. Third, if there is interference by a non-riparian, this "stranger" will be held to a strict non-diminishment or impairment standard. *Dumont*, 29 Mich. at 422, 425.

II. Under both Michigan riparian and groundwater law, the Court of Appeals committed reversible error in *MCWC* and the instant *Anglers of the AuSable* appeal when it included "private or public economic and social benefits" as an additional factor for determining whether a use is lawful under its "reasonable use balancing test."

The Court of Appeals in *MCWC* additionally relied upon *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211 (1902) and *Thompson v. Enz*, 379 Mich. 667, 154 N.W.2d 473 (1967) to generate a list of factors for its "reasonable use balancing test." Both decisions involved competing riparian proprietors and in each, this Court addressed the issue of "reasonable use" by providing factors to be considered to determine whether a use was reasonable. The factors considered by this Court in *Hulbert* and recited in *MCWC* include:

> What the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use. *MCWC*, 269 Mich. App. at 70 (quoting *Hulbert*, 131 Mich. at 170).

In addition to the *Hulbert* factors, the court in *MCWC* further included factors discussed in *Thompson*:

> [A]ttention should be given to the water course and its attributes, including its size, character and natural state . . . the use itself [should be examined] as to its type, extent, necessity, effect on the quantity, quality, and level of the water, and the purposes of the users . . . [and] it is necessary to examine the proposed artificial

> use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the State, including fishing, navigation, and conservation. *MCWC*, 269 Mich. App. at 70-71 (quoting *Thompson*, 379 Mich. at 688-89).

These factors can best be understood to represent physical and detrimental effects and benefits between riparian proprietors' competing uses of surface water. Furthermore, regarding groundwater law and on-tract use, which is governed by the doctrine of reasonable user or rather the correlative rights rule, groundwater use is balanced between users. As groundwater use is balanced between on-tract users, factors considered when determining whether a use is reasonable, also consider physical and detrimental effects and benefits.

After generating these factors from Michigan authorities, the Court of Appeals then used the Restatement (Second) of Torts Section 850A to help analyze the factors. "While these factors are drawn from Michigan authorities, we recognize that the factors listed in Restatement, § 850A, p 220, have many similarities. Because of these similarities, we shall resort to the Restatement as an aid to understanding the role of these factors in the balancing test." *MCWC*, 269 Mich. App. at n.46.

In *MCWC*, the court's attempt to understand the factors addressing the harm and benefits of the use, through reference to the Section 850A of the Restatement (Second), the court mistakenly adopted a new and additional factor, concerning private or public economic and social benefits. "In assessing the harms and benefits, the court should examine not only the economic harm and benefits to the parties, but should also examine the social benefits and costs of the use . . . Negative social effects should weigh against the use . . . and positive social effects should weigh in favor of a determination of reasonableness." *Id.* at 73 (citations omitted).

The Court of Appeals in *MCWC* justified its adoption of this new factor by isolating language in the Restatement (Second) of Torts section 850A, and excerpting language from *Thompson*, and *Hart*. First, *MCWC* pronounced, "the court . . . should also examine the social benefits and costs of the use, such as its effect on fishing, navigation, and conservation." *MCWC*, 269 Mich. App. at 204 (citing *Thompson*, 379 Mich. at 689). However, the full sentence in *Thompson* reads " it is necessary to examine the proposed artificial use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interest of the State, including fishing, navigation, and conservation." *Thomas*, 379 Mich. at 689. What is important is the identification of the benefits and detriments to proprietors and in addition, certain interests to the State. In considering the State's interest, it speaks to the State's Public Trust responsibilities as is mandated in Article IV, Section 52 of the Michigan Constitution providing for the protection of air, *water*, and other natural resources. *Thompson* certainly does not reflect language supporting a new factor addressing generalized social benefits and costs. In addition, *Hulbert* does not suggest that social benefits and costs should be examined. Rather it specifically addresses what must be considered, which includes "the extent of the injury to the one proprietor and of the benefit to the other . . . ." *Hulbert*, 131 Mich. at 170.

Second, the court in *MCWC* refers readers to the Restatement (Second) of Torts section 850A comment f, to demonstrate and evidence how "negative social effects should weigh against the use . . . ." *MCWC*, 269 Mich. at 73. However, no Michigan authority either authorizes or defines "negative social effects" as a factor generated for use in any form of a "reasonable use balancing test."

Finally, the court in *MCWC* cites *Hart* to demonstrate and evidence how "positive social effects should weigh in favor of a determination of reasonableness." Id. It noted that *Hart* included in its determination of reasonableness that the sewer line had a beneficial effect upon the area and more importantly, the inconvenience and loss to the affected on-tract user was minimal and temporary. *Hart* simply affirmed the doctrine of reasonable user as applied to on-tract groundwater use, stating:

> In the case before us water was not transported to distant areas for consumption, nor was there any evidence of permanent damage to the subterranean water table. Here, water was merely moved out of the immediate area of the public easement in order to facilitate sewer construction. Improvement and reasonable development of the public utility easement required such steps. As to the surrounding areas, it was not unreasonable to have a trunk line sewer buried on a public easement, as such use was intended for the area when it was platted. Further, the sanitary sewer trunk line benefitted the area as it was so constructed to allow the surrounding homes to attach their sewers to the trunk line. *Hart*, 7 Mich. App. 319, 322

Certainly positive *local* social impacts (*Hart*'s sewer line) have been considered by Michigan courts, but those impacts are read in the context of *Schenk*, not the literal reading of the Restatement (Second) as asserted by the court in *MCWC*.

As envisioned by the *MCWC* Court of Appeals, adoption of an economic and social benefits factor is unprecedented and will open the floodgates of litigation over its definition and boundaries. Noting footnote 6, Exhibit C of this *Amici* brief by example only, Nestlé's economist's billing in *MCWC* exceeded $30,000 simply at the remanded discovery stage. *Amici* would respectfully suggest a heightened battle among dueling experts over what constitutes reasonable use in terms of a economic and social benefit analysis, only evokes the observation of Mr. Justice Stewart in his concurring opinion and conclusion in *Jacobellis v Ohio*, 378 U.S. 184

(1964), that "I know it when I see it...." But here, under this social science cost- benefit factor analysis, sadly every economist and every social scientist will know it when he or she sees it, regardless of cost and regardless of what party or position they "advocate", resulting with little or no predictability or certainty of the impacts on the legal and historic foundations of Michigan property and water law.

III. Conclusion and Relief Requested.

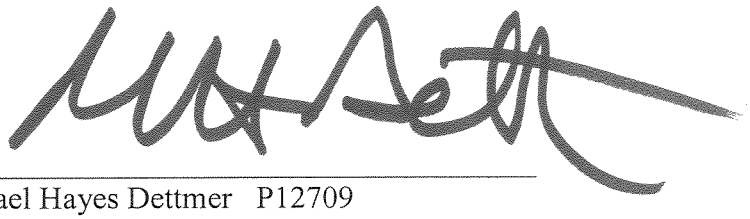
MCWC and its members are committed to conserving, preserving, and protecting Michigan's waters. While this Court's decision will not affect the plaintiff or defendants in *MCWC*, our organization implores this Court to correct Michigan's water law after the Court of Appeals in *MCWC* misinterpreted and misapplied long standing precedents established by this Court and adopted the "reasonable use balancing test," including its new expansive economic and social benefits factor.

The "reasonable use balancing test" will open the floodgates of litigation and the transgressions of definitions and boundaries of Michigan's water law. In addition, affirmance of the economic and social benefits factor in itself, beside the connotations of its legislative intrusion, will lead to repetitive and excessively expensive litigation as to whose use is more "reasonable" when market and commodity forces will now likely be the deciding factor.

The Court of Appeals decision in *Anglers of the AuSable*, is an example of the first of many disputes and decisions that will disable Michigan's mainstay. By way of example, *Amicus* MCWC respectfully posits only a few of the issues affirmance of *MCWC* and *Angler's* reasoning and their "reasonable use balancing test" will bring to this Court's doorstep:

- Will the removal of clear limitations on transfers or exports coupled with a vague balancing of harms with social and economic benefits remove finality and foster uncertainty over the most stable foundation of Michigan's quality of life, property values, and economy?
- Should Michigan remove common law limitations on out of watershed or off-tract transfers, so our lakes, streams, and Great Lakes are opened to a "tragedy of the commons" from an infinite number of users anywhere in the US, North America, or world?
- Should Michigan workers, businesses, and citizens expose our water for transfer and diversion for sale without limits, and end up with negative economic benefits as Michigan jobs and its economy drain with the water?
- Should a lower court expand the right to divert or export water for sale under the common law, so foreign interests can claim control of our water, lakes, and streams under NAFTA or other future trade laws?
- Will opening up Michigan water to anyone outside our watersheds for any use so long as its benefits outweigh the harm put a price tag on Michigan fresh water?
- With United Nations' estimates that the demand for water worldwide will outstrip demand by 40%, will the world point the finger on Michigan to export water under the "reasonable use balancing test," resulting in a tragedy of the commons in our lakes, streams, and Great Lakes?

For all the reasons set forth in this Brief, MCWC respectfully request that the Court overturn the "reasonable use balancing test" adopted in *MCWC* and expanded in *Anglers of the AuSauble* and reaffirm the established common law of this Court for both riparian law and groundwater law.



Dated: September 24, 2010

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